BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of San Diego Gas & Electric Company (U902E) to Amend Renewable Energy Power Purchase Agreement with NaturEner Rim Rock Wind Energy, LLC and For Authority to Make a Tax Equity Investment in the Project	Application 10-07-017 (Filed July 15, 2010)

REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902E) AND NATURENER RIM ROCK WIND ENERGY, LLC ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE ALLEN GRANTING PETITION FOR MODIFICATION OF DECISION 11-07-002

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July 11, 2016

SUBJECT INDEX

TABLE OF AUTHORITIES

STATUTES AND LEGISLATION

CALIFORNIA PUBLIC UTILITIES COMMISSION DECISIONS

OTHER AUTHORITIES

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission" or "CPUC"), San Diego Gas & Electric Company ("SDG&E") and NaturEner Rim Rock Wind Energy, LLC ("NaturEner Rim Rock") respectfully submit these Reply Comments on the Proposed Decision of Administrative Law Judge ("ALJ") Allen Granting Petition for Modification of Decision 11-07-002 ("Proposed Decision" or "PD").

The Proposed Decision would approve - with modifications - a Petition for Modification of D.11-07-002 that involves a proposed settlement (the Avian Conditions Settlement Agreement) between SDG&E, NaturEner Rim Rock and Morgan Stanley that would resolve some very contentious, expensive and lengthy litigation – ongoing since December 2013 – over the terms and conditions of the transaction documents that were the subject of and/or anticipated by the Commission's decision in D.11-07-002.

In opening comments, SDG&E and NaturEner supported the Proposed Decision as written.

In its opening comments (at pp. 1-2), the Office of Ratepayer Advocates ("ORA") also supports the Proposed Decision as written:

> ALJ Allen's proposed decision grants the Petition subject to a modification recommended by ORA that would require a reallocation of the payments under the proposed settlement between SDG&E and NaturEner so that ratepayers receive $39 million. ORA supports the proposed decision's approval of the Petition subject to the modification of the amount allocated to ratepayers. The modification will avoid the duplication of cost recovery for costs already requested by SDG&E in its 2016 General Rate Case. Furthermore, the proposed settlement (as

> modified) is beneficial for ratepayers because it removes litigation risk and eliminates the need for the tax equity investment in the Rim Rock Wind Energy Project. Therefore, the Commission should approve the proposed decision.

In contrast, The Utility Reform Network ("TURN"), in its opening comments, pushes for additional changes to the Petition for Modification (even though TURN, as correctly noted in the Proposed Decision at p. 3, "supported the allocation proposed by ORA" "[i]n the alternative").[1] For the reasons set forth below, the Commission should reject TURN's proposals and approve the Proposed Decision without further revisions at its July 14, 2016 public meeting.

II. DISCUSSION

Under the Avian Conditions Settlement Agreement - as *originally* proposed in the February 16, 2016 Petition for Modification - NaturEner Rim Rock and Morgan Stanley would, among other things, remit to SDG&E a lump sum payment, of which SDG&E would credit the bulk of it to its customers via its Energy Resource Recovery Account ("ERRA") and apply the remaining amount to offset *a portion* of its external legal costs from the pending litigation.

As noted in the Proposed Decision (at pp. 3 and 5), in response to ORA's comments on the Petition for Modification, SDG&E agreed to modify the amount of the settlement that would offset a portion of SDG&E's litigation costs and reallocate an additional amount as a further credit to SDG&E's ERRA to the benefit of ratepayers.

In addition, as noted in the Proposed Decision (at pp. 3-4) and in response to concerns raised by the Assigned ALJ and TURN, SDG&E "agreed to make public the amount of money that would flow to ratepayers through the ERRA," which SDG&E had sought to keep confidential.[2]

Although SDG&E and NaturEner Rim Rock have accepted the modifications identified above to the February 16, 2016 Petition for Modification – and ORA supports the Petition for Modification as amended - TURN would have the Commission go further and make two additional changes. First, TURN proposes a further reallocation of the settlement proceeds such that the entire amount would flow as a credit to SDG&E's ERRA and SDG&E would receive nothing to offset even a portion of its very significant litigation costs. Second, TURN would have the Commission order public disclosure of all of the settlement amounts, not just the

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[1] See TURN's March 17, 2016 response (at p. 5): "TURN's primary recommendation is to deny the PFM [Petition for Modification] unless all proceeds are allocated to ratepayers . . . *Alternatively, the Commission can adopt the specific relief proposed by [ORA] in its response to the PFM*." (emphasis added)

[2] While SDG&E believes this information qualifies for confidential treatment, SDG&E agreed in this specific instance to waive confidential treatment in the interest of moving forward towards a final resolution.

amount that would flow to ratepayers through the ERRA ($39 million). As demonstrated below, the Commission should reject TURN's additional proposed changes to the Petition for Modification.

A. The Litigation Cost Provision, As Modified and Adopted in the Proposed Decision, is Reasonable

As noted above and in the Proposed Decision (at pp. 3 and 5) and in response to ORA's comments on the Petition for Modification, SDG&E already has agreed to modify the amount of the settlement that would offset *a portion* of SDG&E's litigation costs and reallocate an additional amount as a further credit to SDG&E's ERRA to the benefit of ratepayers.

TURN, however, would go further and have the Commission order SDG&E to credit the entire settlement amount to the ERRA. TURN argues (at p. 1) that such an outcome would be reasonable because "the total proceeds allocated to ratepayers are small in comparison to the expensive (and well above market) long-term procurement commitment that is affirmed by the settlement" and because the procurement commitment "could have been avoided if SDG&E's litigation claims had prevailed." TURN ignores that the renewable procurement commitment at issue was reasonable at the time it was entered into. In addition, TURN ignores that the point of the settlement – consistent with the Commission's policy of favoring settlements – is to "reduce the risk that litigation will produce unacceptable results."[3] If SDG&E were to proceed with and lose the litigation in San Diego Superior Court, there could be a number of unacceptable outcomes to SDG&E, including an obligation to pay significant damages.

Among other things, TURN also argues (at pp. 1-2) that "SDG&E failed to present any evidence of its actual litigation costs" and that "[t]he Commission should not accept SDG&E's representations without an itemization of all costs incurred that are both relevant to the litigation and incremental to amounts already being collected from ratepayers." TURN ignores the fact that at least some of the information TURN appears to be requesting was included in SDG&E's response to a data request from ORA, which SDG&E also provided to TURN.[4] If TURN desired additional information, it could have promulgated its own data request and sought to enter that information into the record of this proceeding.[5] In addition, as SDG&E has previously explained, Rim Rock litigation costs were *not* included in the forecast for its Test Year 2012

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[3] D.11-07-002 at p. 14 and footnotes 12 and 13 (citing multiple Commission decisions).

[4] SDG&E responded to ORA's data request on March 2, 2016. See Attachment 1 of ORA's March 17, 2016 response to the Petition for Modification. With ORA's permission, SDG&E shared its response to ORA's data request with TURN on March 18, 2016.

[5] In addition, when TURN was asked at the May 24, 2016 prehearing conference by the ALJ whether "any other process is needed before this [matter] goes to [a] proposed decision," TURN said "No." Tr. p. 76, lines 2-6.

General Rate Case ("GRC") and thus have *not* been reflected in GRC rates for the 2013-2015 time period,[6] which is when virtually all of the litigation costs were incurred (as set forth in the Petition for Modification, the litigation commenced on December 19, 2013; the litigation was stayed shortly after the February 16, 2016 filing of this Petition for Modification). This contrasts with the *2016* GRC (A.14-11-003), in which a small amount of Rim Rock litigation cost was forecasted, which is what led to the cost reallocation proposal of ORA that the Proposed Decision adopts.

Finally, the Commission also should reject TURN's further reallocation proposal because it would unfairly penalize SDG&E for taking actions on behalf of its ratepayers. The transaction documents that the Commission authorized SDG&E to enter into in D.11-07-002 contained conditions precedent ("CPs"), including the CPs at issue in this litigation, specifically designed to protect SDG&E's customers from unreasonable risk. SDG&E reasonably exercised its rights under the contracts to enforce these CPs on behalf of its customers[7] and has incurred significant costs in doing so. SDG&E does not believe it would be equitable to penalize SDG&E for taking these actions on behalf of its customers by rejecting SDG&E's entire litigation cost request.

B. The Confidentiality Treatment of the Settlement Terms, as Modified and Adopted in the Proposed Decision, is Reasonable

As noted above and in the Proposed Decision (at pp. 3-4) and in response to concerns raised by the Assigned ALJ and TURN, SDG&E "agreed to make public the amount of money that would flow to ratepayers through the ERRA," which SDG&E originally had sought to keep confidential. TURN would go further and have the Commission order SDG&E and NaturEner to also publicly disclose the overall settlement amount and the amount that would go towards offsetting a portion of SDG&E's litigation costs.[8] According to TURN (at p. 2), "[t]here has been no showing of commercial harm that would occur as the result of public disclosure of this particular settlement term."

TURN ignores SDG&E's February 16, 2016 Motion to Seal (filed concurrently with the Petition for Modification), in which SDG&E demonstrated that the confidential, market sensitive information provided in the Petition for Modification falls within the scope of data protected as confidential pursuant to and within the limitations of the Commission's confidentiality rules with

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6 See the March 28, 2016 Reply of SDG&E and NaturEner (at pp. 3-4).

7 In the pending litigation, NaturEner contested this assertion.

8 TURN does not distinguish between these two amounts, but if the Commission were to order SDG&E to disclose the amount that would go to offset a portion of its litigation costs, that necessarily would result in the disclosure of the overall settlement amount because the overall settlement amount represents the sum of the ERRA credit ($39 million) plus the partial litigation cost offset.

respect to electric procurement matters set forth in D.06-06-066 (pursuant to Public Utilities Code Section 454.5(g)) and/or relevant statutory provisions, such as the statutory privilege for trade secrets.[9] If the Commission were to order SDG&E to publicly disclose all of the settlement amounts, this would place SDG&E – and its customers – in an unfair business position. It would give added leverage to counterparties who do not share SDG&E's obligation to protect consumers by providing insight into the utility's bargaining position without equivalent sunshine on the counterparty's position, harming SDG&E's ability to negotiate settlements favorable to its customers in future potential disputes with developer counterparties.

In addition, as explained at the May 24, 2016 prehearing conference, public disclosure of the terms and conditions of settlement agreements also could chill market participants from entering into settlements in the first place.[10]

In summary, the confidentiality approach crafted by the ALJ at the May 24, 2016 prehearing conference that is set forth in the Proposed Decision is reasonable and should be adopted without further change.

III. CONCLUSION

In conclusion, SDG&E and NaturEner respectfully request that the Commission approve the Proposed Decision without change at its July 14, 2016 meeting.

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This 11th day of July, 2016

[9] Under the Public Records Act, Government Code § 6254(k), records subject to the privileges established in the Evidence Code are not required to be disclosed. Evidence Code § 1060 provides a privilege for trade secrets, which Civil Code § 3426.1 defines, in pertinent part, as information that derives independent economic value from not being generally known to the public or to other persons who could obtain value from its disclosure.

[10] Tr. p. 73, lines 15-18: "[I]f the counter-parties knew that the terms and conditions would not be confidential . . . there may be a disincentive to actually come to a settlement."